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In the Supreme Court of the United States

No. ~~658~~

OCTOBER TERM, 1967.

LAWRENCE WAYNE TYREE,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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In the Supreme Court of the United States

No. _____.

OCTOBER TERM, 1967.

LAWRENCE WAYNE TYREE,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on June 30, 1967.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit, printed in the Appendix at page 15 below, is not yet reported.

JURISDICTION.

The case was decided by the Court of Appeals on June 30, 1967 and the opinion of the Court was filed on the same date. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Did the trial judge commit error prejudicial to the plaintiff, a railroad employee claiming damages by reason of his employer's violation of the Federal Employers' Liability Act, by defining legal causation in his charge to the jury in terms of the common law standard of proximate causation in lieu of the special standard created by Congress for the protection of railroad employees?

2. Assuming that the answer to the preceding question is yes, was the error rendered harmless by the fact that at several instances during the charge the trial judge employed the language of legal causation incorporated in the Act?

STATUTES INVOLVED.

The statutory provision involved is 45 U. S. C., Section 51, as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its

cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF CASE.

The instant action was brought by plaintiff upon his Second Amended Complaint filed in the District Court for the Southern District of Ohio on February 19, 1964. The jurisdiction of the District Court was invoked because the case arises under the Federal Employers' Liability Act. Plaintiff charged his employer, The New York Central Railroad Company, with negligence under the Federal Employers' Liability Act, 45 U. S. C., Sections 51 through 60, and amendments thereto, and with a violation of the Safety Appliance Acts, 45 U. S. C., Sections 1 through 11, and amendments thereto, in his first cause of action, and with negligence under the Federal Employers' Liability Act in his second cause of action. The two causes of action set forth in the Complaint were grounded upon separate incidents which occurred on different dates. Defendant, by its Answer to said Second Amended Complaint, filed February 25, 1964, admitted that the plaintiff was entitled to the coverage of the Federal Employers' Liability Act in each of the two causes of action, but denied that the plaintiff was either injured as the result of any negligence of the defendant or as the result of a violation of a Safety Appliance Act in the first cause of action, and denied that

plaintiff was injured as a result of any negligence of the defendant in the second cause of action.

The case was tried to a jury and the jury returned a verdict in favor of the plaintiff in the first cause of action in the amount of $5,000.00 and in favor of the defendant in the second cause of action. The verdict of the jury was accepted by the District Court and judgment was entered thereon. Thereafter, plaintiff filed his Motion for a New Trial on the second cause of action, which was duly opposed by defendant. The Motion for a New Trial was denied and plaintiff thereupon filed his Notice of Appeal from the judgment of the District Court overruling the Motion for a New Trial on the second cause of action. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. The judgment on the first cause of action is in no way pertinent to the instant petition.

On June 29, 1960, Lawrence Wayne Tyree, an employee of the defendant railroad, was working as conductor of a switching crew assigned to carry on switching operations on track located in and about the Frigidaire Plant of the General Motors Corporation at Morraine City, Ohio. (9a, 22a, 23a.) Generally speaking, Tyree and the other members of his crew would bring empty cars into the Frigidaire Plant and haul out loaded cars. At approximately 2:30 P.M. on the day in question Tyree and his crew were inside the plant having just brought in an engine for the purpose of pulling out cars which had been previously loaded and were standing alongside the loading platform in the plant (23a). Tyree and Robert A. Miller, a brakeman assigned to Tyree's crew, had dismounted the stationary engine and were engaged in checking their switch list. They were standing on the loading platform alongside the cab of the engine (23a, 24a). They were to

wait on the platform until they received the signal that the train was ready to be moved and then were to pass the signal on to the engineer. As the train began to move they were to mount the rear end of the engine so that they would be in a position to carry out whatever duties might be required of them when the train reached the switch yards (28a, 29a).

Along the loading platform there stood several rows of stacked bundles which ran parallel to the track. Each bundle consisted of a quantity of flattened out corrugated paper and weighed approximately 100 to 200 pounds. In the area in which Tyree and Miller were working the bundles were stacked unevenly and were leaning toward the track. Further, the row of bundles closest to the track had been stacked in such a manner as to encroach upon a safety zone which was marked off by a yellow line painted on the platform (15a, 26a, 44a, 72a, 78a, 83a, 84a). Railroad employees had nothing to do with the manner or method of stacking these bundles. This was solely a Frigidaire function (73a). Prior to the day in question, complaints about the manner in which the bundles were stacked had been registered by railroad employees with the yardmaster who was employed by the defendant railroad. After such complaints the situation would be temporarily corrected and then would be allowed to lapse back into the previous hazardous state which gave rise to the complaints (26a, 27a, 59a, 60a, 61a).

As Tyree and Miller were studying the switch list while standing in the space on the loading platform between the engine and row of stacked bundles, Tyree heard a shout. He looked around and saw that some of the stacked bundles were falling towards him. He tried to jump out of the way but was struck in the back by a bundle and knocked off balance (29a). Miller testified

that prior to the accident he heard mechanical equipment being operated behind the stacks (45a). Another member of the crew testified that he saw the bundles fall and that he saw a high lift truck being operated by Frigidaire employees in proximity to the stacks at the time of the accident (57a).

At the close of all the evidence counsel for the plaintiff submitted in writing the following special request to charge:

> "An injury or damage is proximately caused by an act, or failure to act, whenever it appears, from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find, from the evidence in the case, that any negligence of the defendant contributed, in any way or manner, toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission." (110a.)

Rather than accept this suggested definition of legal causation, the trial judge defined legal causation as follows:

> "Proximate cause—and I told you this definition, too, applies to the first cause of action—proximate cause of the injury is that which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which it would not occur. In simpler terms, it is the direct and counter-distinction from the remote cause of any injury. Proximate cause does not necessarily mean the cause nearest in point of time or in point of distance but it does mean that cause without which the injury would not have occurred. It is the cause from which a person of ordinary experience and sagacity would foresee what hazard would likely follow." (117a.)

At the conclusion of the entire charge counsel for the plaintiff took exception to the failure of the trial court to give the charge on legal causation tendered by the plaintiff, and further took exception to the definition of legal causation actually employed by the court. Objection was taken on the ground that the definition given did not respect the critical distinction between the common law standard of legal causation and the special standard created by Congress for the benefit of railroad employees (127a, 128a).

REASON FOR GRANTING THE WRIT.

The question presented is of importance in the administration of the Federal Employers' Liability Act and was decided by the Court below in a manner so as to conflict with applicable decisions of this Court.

The issue is whether in a case brought pursuant to the rights granted railroad employees by the Federal Employers' Liability Act, a trial judge commits prejudicial error in constantly using the terms "proximate" and "proximately" when referring to legal causation and then using the common law definition of proximate cause to give meaning to the terms. The Court below held that although the common law definition of proximate cause has no proper place in an F. E. L. A. trial, the plaintiff was not prejudiced as the charge in several instances also included the language of legal causation set forth in the Statute. Petitioner agrees that the common law standard has no place in an F. E. L. A. trial and contends that the trial court committed prejudicial error when he incorporated it in his charge; petitioner further contends that the mere use of the statutory standard along with the erroneous common law standard of legal causation does not serve to make the error harmless.

In 1957 this Court endeavored to point out clearly and finally that the standard of legal causation established by the Congress for the protection of railroad employees covered by the Federal Employers' Liability Act was vastly different from the traditional common law standard. In reversing a decision of the Supreme Court of Missouri, which held that as a matter of law the plaintiff had failed to present evidence sufficient to establish a jury question on the issue of legal causation, the Court, after reviewing the opinion of the Missouri Court, stated:

> "That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.
>
> "Under this statute the test of a jury case is simply *whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.* It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." *Rogers v. Missouri Pacific R. Co.*, 1957, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493. (Emphasis added.)

Since that case, which stands as a stern warning that trial courts, both Federal and State, are to respect the difference between the congressionally created standard of legal causation and the common law standard, this Court has repeatedly reiterated the distinction and enforced it by ruling that failure to apply the special standard created

for the benefit of railroad employees will result in reversal and new trial. See *Webb v. Illinois Central R. Co.*, 1957, 352 U. S. 512, 516, 77 S. Ct. 451, 1 L. Ed. 2d 503; *Ferguson v. Moore-McCormack Lines*, 1957, 352 U. S. 521, 523, 77 S. Ct. 457, 1 L. Ed. 2d 511; *Moore v. Terminal Railroad Association*, 1958, 358 U. S. 31, 79 S. Ct. 2, 3 L. Ed. 2d 24 and cases there collected; *Harris v. Pennsylvania R. Co.*, 1959, 361 U. S. 15, 80 S. Ct. 22, 4 L. Ed. 2d 1. Petitioner contends that this Court must speak again if the rights in question are not to be eaten away by judicial construction.

The petitioner contends that the trial court's use of the complex common law standard of legal causation in lieu of the simple test spelled out by the express language of the Statute which created the right constituted prejudicial error. Although this Court in *Rogers* and the long line of cases which followed has been most concerned with the standard of legal causation employed in determining whether the plaintiff has raised a jury question, what was said by this Court in those cases about the standard of legal causation in a Federal Employers' Liability Act case must be followed by a trial judge when he charges the jury on the issue of legal causation. A railroad employee entitled to the benefits of the Act can be just as effectively deprived of his rights by a jury charge containing a standard of causation more rigid and demanding than the standard created by Congress, as by use of the same too rigid and demanding standard by the trial judge in ruling on a motion for directed verdict.

Recognizing that the warning given by this Court in *Rogers* would ring hollow if trial judges were permitted to use in the charge the common law standard of causation prohibited from use on a motion to direct a verdict and recognizing that a trial judge cannot be permitted to ac-

complish by his charge to the jury what he is prohibited from doing on a motion for a directed verdict, the Fifth Circuit Court of Appeals, following the lead of the Second Circuit in *DeLima v. Trinidad Corporation*, 1962, 302 F. 2d 585, held that a charge in a Federal Employers' Liability Act case which included a definition of legal causation almost identical to that employed by the trial court in this case constituted error sufficiently prejudicial to be ground for a new trial. *Page v. St. Louis Southwestern Rwy. Co.*, 1963, 312 F. 2d 84. Petitioner contends that the *Page* and *DeLima* decisions are direct authority in support of his contention that the use of the common law standard of proximate causation in the charge to the jury constitutes prejudicial error.

The prejudicial effect of the court's erroneous definition of the standard of legal causation can only be fully appreciated when read against the facts of the case. This case arose out of an accident which occurred on the premises of the Frigidaire Plant of the General Motors Corporation. The bundles which fell and allegedly caused injury to the plaintiff were put in position and stacked by employees of Frigidaire (73a). The high-lift truck which was allegedly in the vicinity of the stacks when the accident occurred and which might have caused the bundles to fall was operated by an employee of Frigidaire (87a). According to the charge given by the trial judge the defendant could only be found liable if its negligence in "natural and continuous sequence unbroken by any intervening cause" produced the injury and if its negligence was "the direct" as distinguished from a "remote" cause of the injury (118a). The jury, instructed in this manner, might well have determined that even though the defendant breached its duty to the plaintiff, negligent operation of the high-lift truck by an employee of Frigidaire consti-

tuted an "intervening cause" breaking the chain of causation running from the defendant railroad, or that improper stacking of the bundles on the part of Frigidaire was "the direct cause" of the injury, and that negligent conduct of the railroad was merely a "remote cause."

The use of the common law charge on causation with the requirement that there be no intervening cause and the distinction between the direct cause and remote causes effectively ameliorates a supposedly inviolable principle of the Federal Employers' Liability Act—that the railroad has the nondelegable duty to provide its employees with a reasonably safe place to work. Though this duty may not be delegated, the use of the common law standard of causation can serve to make it meaningless by introducing the conduct of the third party as a means of breaking the chain of causation running from the railroad. When the simple test created by Congress is employed there is no danger that a jury, convinced that negligence of the railroad played some part in causing injury to the plaintiff, will become confused and rule for the defendant on the ground that negligence of the third party constituted an "intervening cause" or was the "direct" as distinguished from a "remote" cause.

The Court of Appeals, having assumed arguendo that the use of the common law standard constituted error, held that "the court's repeated instructions on *proximate* cause which fully complied with the statute" (emphasis added) served to render the error complained of harmless. Although the trial judge did in fact incorporate the statutory language of legal causation in his charge to the jury, he frequently used the terms "proximate" and "proximately" when making reference to the proper standard of legal causation. As noted in the Opinion of the Court below, the following language was used in the trial Court's charge to the jury:

"Now when we get to the discussion of a second cause of action we have three questions for your consideration. First, whether the defendant, that is the railroad company, was negligent as claimed by the plaintiff in his complaint; Second, whether such negligence, if any, either in whole or in part proximately caused the injuries of which plaintiff complains * * *." (116a.)

"If you find by a preponderance of the evidence, considering all the facts and circumstances in this case as shown by the evidence the defendant failed to fulfill its duty to exercise reasonable care to furnish plaintiff a safe place of work and that such failure proximately contributed in whole or in part to cause plaintiff's injuries then your verdict is for the plaintiff." (120a.)

"In other words if the employee's negligence concurred with the railroad's negligence proximately causing the injury, the employee is still entitled to recover a verdict * * * If you find that the plaintiff and the defendant were guilty of negligence and the negligence of both proximately contributed to bring about the injuries sustained by the plaintiff, you will compare the negligence of the plaintiff and the negligence of the defendant and the amount of recovery should be diminished in proportion to the amount of negligence contributable [attributable] to the plaintiff." (121a.)

"Now what do you say after a full, fair, and impartial consideration of all of the evidence in this case? Was the defendant negligent? Whether such negligence, if any, either in whole or in part proximately caused the injury of which he complains?" (122a.)

As the Court below pointed out in its opinion, proximate cause is an unclear and confusing phrase which "does not fall in that class of words and phrases where the meaning is commonly known and understood by the lay public." Quite simply, the terms, "proximate" and "proximately,"

when used in a charge to the jury, demand definition by the trial judge. The definition given, as indicated above, was erroneous.

It is petitioner's contention that the erroneous definition of the standard of legal causation served to poison the remainder of the charge. This is not a situation in which a single erroneous paragraph is saved by a reading of the full charge; this is the contrary situation in which an error is compounded and magnified by the remainder of the charge. Each time the jurors heard the terms "proximate" or "proximately" they were necessarily forced to refer back to the erroneous definition which the trial court had given them and instructed them to apply. Thus, although the erroneous definition was stated but once, its effect permeated the entire charge, including the portions which purportedly state the proper standard of legal causation.

CONCLUSION.

In summary, petitioner contends that the Court of Appeals erred when it stated that, considering the charge as a whole, there was no error. When read as a whole, the charge, with reference to legal causation, is not only erroneous but entirely confusing. The trial judge hopscotched from "proximate cause" to "cause either in whole or in part" to "proximately contributed" to "either in whole or in part proximately caused." How a jury faced with this inconsistency of language and the improper definition of legal causation which they were directed to look to each time they heard the term "proximate" or "proximately" could reach the proper conclusion that they were to determine only whether employer negligence played any part, even the slightest, in producing the injury complained of remains a mystery to the petitioner.

If the law is as stated by the Court below, injured railroad employees, as a result of jury confusion and mis-

direction, may be deprived of the very rights which Congress took great pains to create and which this Court has so ardently striven to protect. The use of the common law standard of legal causation with its distinction between direct and remote cause, its requirement that there be no intervening cause, and its requirement that the injury follow in a natural and continuous sequence has no place in a Federal Employers' Liability Act case. If the rights granted employees by the Congress are to be anything more than mere words written on paper, the trial courts, both State and Federal, must be instructed again to heed the admonition of *Coray v. Southern Pacific Co.*, 1949, 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208:

> "The language selected by Congress to affix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction and dialectical subtleties can serve no useful interpretative purpose."

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided June 30, 1967.)

Before: WEICK, Chief Judge, McCREE, Circuit Judge, and McALLISTER, Senior Circuit Judge.

McALLISTER, Senior Circuit Judge. Lawrence Wayne Tyree, appellant, an employee of The New York Central Railroad Company, filed his complaint against the company, embodying two causes of action, based on the Federal Employers' Liability Act, Title 45 U. S. C. A. Sections 1 et seq.

He founded his first cause of action on Section 2 of the Act, which imposes an absolute duty on a railroad carrier to use in its operation only such railroad cars as are equipped with an automatic coupler, which is manipulated, for certain purposes, by raising a cutting lever. Appellant Tyree claimed that he had been injured on May 16, 1960, when the cutting lever of the coupler broke while he was using it for the purposes intended. There is no need to go further into this aspect of the case, since appellant was awarded a verdict in the amount of $5,000 on this first cause of action, and the judgment entered thereon has now been satisfied.

On the second cause of action, appellant claims that on June 29, 1960, while working as a yard conductor for the Railroad on an industrial switching job for the Frigidaire Plant of General Motors Corporation at Moraine, Ohio, he was injured by reason of being required to perform work duties on a loading dock at the Frigidaire Plant, at a time when freight stacked in bundles was caused, through the negligence of the defendant railroad company, to topple and fall against him, forcing him against

the side of a standing switch engine. On this second cause of action, the jury found in favor of the Railroad against appellant Tyree. The only question before us on this phase of the case is whether the trial court committed error in its instructions to the jury.

Title 45 U. S. C. A. Sec. 51 provides:

> "Every common carrier by railroad while engaging in [interstate] commerce * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, * * * or other equipment."

In *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506, 507, the Court, in passing upon the question of an employer's negligence under the Act, said:

> "Under this statute the test of a jury case is simply *whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.* It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, *the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.*" (Emphasis supplied and citations omitted.)

At the close of the evidence in the instant case, appellant's counsel submitted to the trial court the following special request to charge, which has come to be known as

the Mathes and Devitt Instruction* and which was discussed by Judge Edwards in *Morrison v. New York Central Railroad Company,* 361 F.2d 319:

> "An injury or damage is proximately caused by an act, or failure to act, whenever it appears, from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find, from the evidence in the case, that any negligence of the defendant contributed, in any way or manner, toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission."

The district court did not give the requested charge. However, in its charge to the jury, the court commenced its instructions by saying:

> "Now to get into another section of the Federal Employers' Liability Act. And that is Title 45 Section 51 and it reads:
>
> " 'Every common carrier by railroad while engaging in [interstate] commerce, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * *resulting in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, * * * or other equipment.' " (Emphasis supplied.)

Considered as a statement of law, the foregoing could not be subject to complaint inasmuch as it specifically told the jury exactly what the statute provided; that the Rail-

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* Federal Jury Practice and Instructions, Mathes and Devitt, West Publishing Co., 1965 (p. 517).

road would be liable in damages to an employee suffering injury *resulting in whole or in part* from the negligence of any of the officers, agents, or employees of the Railroad. The court then stated to the jury:

> "Now when we get to the discussion of the second cause of action we have three questions for your consideration. First, whether the defendant, that is the railroad company, was negligent as claimed by the plaintiff in his Complaint; second, whether such negligence, if any, either in whole or in part proximately caused the injuries of which plaintiff complains; third, was the plaintiff himself guilty of negligence or any act of negligence which is termed contributory negligence which is the sole cause of injuries or which directly and proximately contributed thereto in any degree; * * *."

All of the charge up to this point is clearly correct.

The chief complaint of appellant is that the court, during its charge, stated to the jury the following:

> "Proximate cause—and I told you this definition, too, applies to the first cause of action—proximate cause of the injury is that which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which it would not occur. In simpler terms, it is the direct and counterdistinction from the remote cause of any injury. Proximate cause does not necessarily mean the cause nearest in point of time or in point of distance but it does mean that cause without which the injury would not have occurred."

The foregoing is the language embodying the traditional concept of proximate causation, rather than the language of causation which appears in the Federal Employers' Liability Act, in which it is stated that the employer is liable if the injury results in whole or in part from its negligence.

Whatever may be said about the foregoing statement of the trial court as tending to be foreign to the simpler test set forth in *Rogers v. Missouri Pacific R. Co., supra,* we must consider the whole of the court's charge to ascertain whether the court misled the jury into applying the traditional common law standard of proximate cause, instead of the statutory standard of legal causation established by Congress in cases coming under the Federal Employers' Liability Act in which the employee is entitled to recover if employer negligence played any part, even the slightest, in producing the injury.

Judge Martin, in speaking for this Court, said in *Spaeth v. United States,* 232 F.2d 776, 777, C. A. 6, "that a reviewing court should not pick out one erroneous paragraph of a long charge and reverse upon it, if, upon consideration of the entire charge, it appears that the jurors were correctly instructed as to the applicable law in such manner as to leave no confusion in their minds."

In 53 Am. Jur.—Trial—Section 842, the general rule is well stated: "In considering the correctness and adequacy of a charge to the jury, it should be taken as a whole and read in its entirety; that is, each instruction must be considered in connection with others of the series referring to the same subject and connected therewith, and if, when taken together, they properly express the law as applicable to the particular case, there is no just ground of complaint, even though an isolated and detached clause is in itself inaccurate, ambiguous, incomplete, or otherwise subject to criticism." Cited in support of the foregoing rule is *Patapsco Insurance Co. v. Southgate,* 30 U. S. 602, 621.

In *Sessoms v. Union Savings & Trust Company,* 338 F.2d 752, 758, C. A. 6, the court quoted the following rule, from 89 C. J. S.—Trial—Sec. 441: "A correct instruction will cure the error in another only where the instructions,

as a series, state the law correctly, and it is evident that no harm has been done by the erroneous instruction."

In keeping with the foregoing enunciations of the rule, and more particularly applicable to the instant case, is the following statement from 53 Am. Jur.—Trial—Section 838: "Applying the rule as to cure of erroneous instructions by other instructions, it has been held that an instruction likely to mislead the jury may be cured by others covering the same point in a clear and concise manner, and that an instruction which, taken by itself, is ambiguous and in one view erroneous will be cured by another qualifying it if it is apparent that the jury could not have been misled thereby. Thus, it has been declared, where a court at the conclusion of a charge returns to a subject considered earlier and gives additional instructions in regard to it, that the jury may naturally regard them, so far as they may state a new and different rule, to be intended to qualify as a last word what has been previously said, and will be presumed to have accepted them as controlling."

It is, then, to be said that in addition to those portions of the charge, which we have heretofore mentioned as indubitably proper, the court in a further discussion of causation of accidents to railroad employees, instructed the jury as follows:

> "When a railroad employee's injuries are *caused in whole or in part* by the fault of others performing operational activities of its employer, such others are agents of the employer within the meaning of Section I of the Federal Employers' Act." (Emphasis supplied.)

The court further stated in discussing proxi[illegible] cause in the instant case:

"If you find by a preponderance of the evidence, considering all the facts and circumstances in this case as shown by the evidence the defendant failed to fulfill its duty to exercise reasonable care to furnish plaintiff a safe place of work and that such failure proximately contributed *in whole or in part* to cause plaintiff's injuries then your verdict is for the plaintiff." (Emphasis supplied.)

The court then instructed that "if the employee's negligence concurred with the railroad's negligence proximately causing the injury, the employee is still entitled to recover a verdict. * * * If you find that the plaintiff and the defendant were guilty of negligence and the negligence of both proximately contributed to bring about the injury sustained by the plaintiff, you will compare the negligence of the plaintiff and the negligence of the defendant and the amount of recovery should be diminished in proportion to the amount of negligence contributable [attributable] to the plaintiff."

In seeking further to clarify the subject for the jury, the trial court then gave an illustration to show the damages to which a plaintiff might be entitled even though he were guilty of contributory negligence.

Finally, in summing up the whole case as far as the defendant's negligence was concerned, as well as any possible negligence on the part of the plaintiff, the trial court said:

"Now what do you say after a full, fair and impartial consideration of all of the evidence in this case? Was the defendant negligent? Whether such negligence, if any, *either in whole or in part* proximately caused the injury of which he complains? Was the plaintiff himself guilty of negligence, or any act of negligence, which was the sole cause of his injuries or directly and proximately contributed

thereto in any degree. In the event that your verdict should be for the plaintiff you award to him, subject to the Court's instructions already given to you, such damage as in your judgment will fairly and reasonably compensate him for whatever injury, if any, you find he has sustained." (Emphasis supplied.)

Assuming as erroneous the court's instruction to the jury, on a single occasion as previously mentioned, in language embodying the traditional concept of proximate causation, whereas the applicable standard in this case is that prescribed by the Federal Employers' Liability Act, in which the employee is entitled to recover if employer negligence played any part, even the slightest, in causing the injury, nevertheless, the court's repeated instructions on proximate cause which fully complied with the statute, comprising, among others, its opening statement, quoting the statute, and its concluding observation, and final instruction on causation, emphasizing that if the defendant's negligence, in whole or in part, caused the accident, plaintiff would be entitled to recover, constrain us to conclude that the error complained of was harmless; that it was cured by all of the other instructions that complied with the statute; and that the court's prior statement of the traditional common law standard of proximate cause did not constitute reversible error.

It should be mentioned that, at the conclusion of the proofs, appellant excepted to the failure of the trial court to give the requested instruction, heretofore mentioned, in which the court was asked to charge the jury that "if you should find, from the evidence, in this case, that any negligence of the defendant contributed, in any way or manner, toward any injury or damage suffered by the plaintiff, you may find that such injury was proximately caused by the defendant's act or omission."

The trial judge disregarded this request and exception on the ground, apparently, that he had already charged the jury to this effect in his prior instructions, embodying the same rule in somewhat different language; and we agree with such conclusion.

However, it is to be said that since the definition of "proximate cause" has proved the source of difficulty in this case, and while it would have been proper to give the Mathes and Devitt instruction as requested by appellant, nevertheless, it would be better in Federal Employers' Liability Act cases if no mention of proximate cause whatever was made to the jury and, following the views of the Supreme Court as expressed in *Rogers v. Missouri Pacific R. Co., supra,* that the jury be instructed on the subject of causation to the effect that if employer negligence played any part, even the slightest, in producing the injury, the employer is liable in damages, and that if the employee's negligence contributed in part to the injury, the negligence of the employer and employee be compared, and the amount of recovery be diminished in proportion to the amount of the employee's negligence. This would remove the troublesome phrase of proximate cause from Federal Employers' Liability Act cases.*

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* The Supreme Court in *Rogers v. Missouri Pacific R. Co. supra,* was obviously avoiding use of the phrase "proximate cause," and under the Federal Employers' Liability Act, considered that it was justified in doing so. For it is an unclear and confusing phrase at best, as illustrated in the general and unquestionable statement in 65 C.J.S. § 103:

> "'Proximate cause' has proved to be an unsatisfactory and troublesome phrase. It is a legal concept with a particular meaning in the law, but is difficult to define, and does not fall in that class of words or phrases where the meaning is commonly known and understood by the lay public. It is merely a limitation which the courts have placed upon a person's responsibility for the consequences of his conduct.
>
> "Literally, the proximate cause is the cause nearest to the effect produced, but in the law of negligence the term is

Other contentions raised on appeal, we find not meritorious.

In accordance with the foregoing, the judgment of the district court is affirmed.

WEICK, Chief Judge, concurring in judgment.

I agree that the Court reached the correct result in deciding that the instructions of the trial court to the jury should be considered as a whole and when so considered they were not prejudicially erroneous. This should be sufficient to decide the case.

I do not agree that proximate causation, which is an essential ingredient of liability in all negligence cases, is dispensed with in actions brought under the Federal Employers Liability Act. Even though a defendant is such an action is liable where the injury results from his negligence, either wholly or in part, such negligence in my opinion must be *a* proximate cause of the injury in order to warrant recovery. Plaintiff may not recover if his own negligence was *the* sole proximate cause of his injury. Neither may plaintiff recover where there was negligence on the part of the defendant if that negligence was not *a* proximate cause of the injury.

(Continued from preceding page)

> not confined to its literal meaning; nor is it the same as proximate cause in logic, philosophy, or metaphysics, although it has been said to be akin to what is called an 'efficient cause' in logic";

and in 38 Am. Jur. § 50:

> "The great variety in both form and content of definitions of proximate cause attests the difficulty which is experienced in attempting to formulate a workable definition of this term. No definition of proximate cause can be altogether clarifying or satisfactory, since, inevitably, terms used in the definition will themselves require definition."

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Before Weick, Chief Judge, McCree, Circuit Judge and McAllister, Senior Circuit Judge.

June 30, 1967.

Appeal from the United States District Court for the Southern District of Ohio.

This case came on to be heard on the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendant-appellee recover from plaintiff-appellant the costs on appeal as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.